

# Is Taking Photos of Artwork a Copyright Infringement?

By Jacques M. Wood, Esquire

There have been questions recently raised about whether photographs of artwork entered into club competitions constitute copyright infringement. The short answer is that it is unlikely that any such conduct would be found by a court to be violative of copyright law. While most artwork has copyright protection, photos of art entered into competitions like Sandhills Photography Club's bi-monthly judging would likely fall under the "fair use" exception to copyright protection. This article is however intended to provide an overview of the general principles concerning taking photographs of artwork in the United States. It should not be used a substitute for legal advice; photographers should seek counsel for specific situations from an attorney with knowledge of copyright law.

The starting point for analysis is ascertaining what work has copyright protection. Today, every creator of an artistic work automatically receives copyright protection. There is no need to register works with the U.S. Copyright Office or other international registering bodies. Even so-called "illegal" or unauthorized art—graffiti or street art—is copyrighted from the moment of its creation.

So the only works that would likely not receive copyright protection are those works where copyright has expired. In the U.S, copyright duration is Life of the Author plus 70 years.

## Copyright Protection

There are six basic rights protected by copyright. The owner of copyright has the exclusive right to do and to authorize others to do the following:

- To *reproduce* the work in copies ... ;
- To prepare *derivative works* based upon the work;

- To *distribute* copies ... of the work to the public by sale ... or lending;
- To *publicly perform* the work ...;
- To *publicly display* the work, in the case of ... pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work.
- To *digitally* transmit sound recordings by means of digital audio transmission.

A violation of any of these exclusive rights of the copyright holder is a copyright infringement, unless fair use (or a similar affirmative defense) applies.

## **Fair Use**

Fair use is a doctrine in United States copyright law that allows limited use of copyrighted material without requiring permission from the rights holder, such as use for scholarship or review. Fair use deals with the concept that even though a work is copyrighted, and the artist, photographer, or writer has exclusive rights, certain uses do not constitute copyright infringement.

As defined by Section 107, under Title 17 of the United States Code: **§ 107.** Limitations on exclusive rights: Notwithstanding the provisions of sections 106 and 106A, **the fair use of a copyrighted work ... is not an infringement of copyright.** In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

(emphasis added)

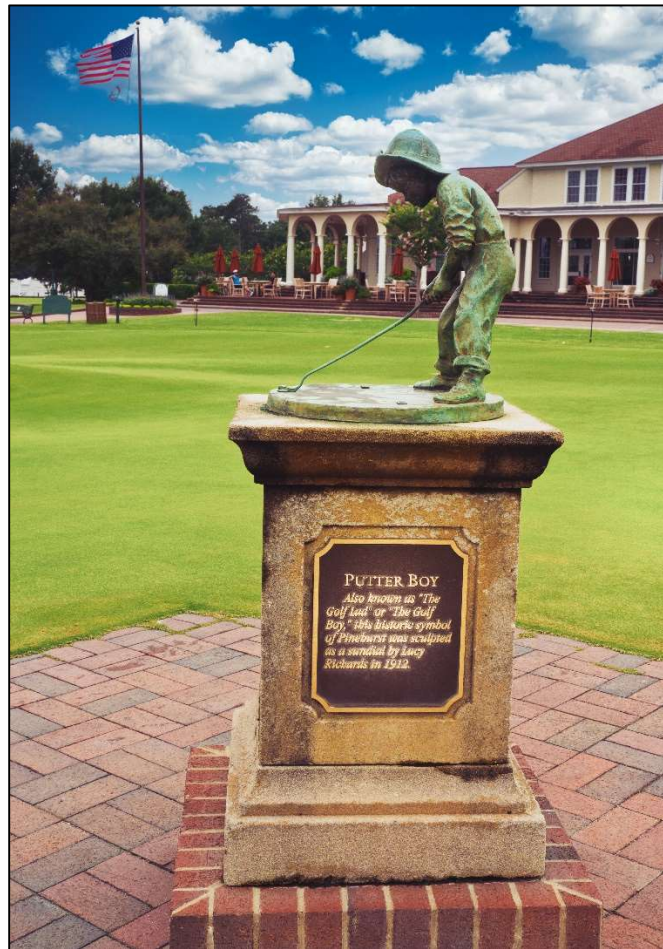
Photographing public art is allowed, subject to either gallery or museum restrictions. It's the use of that photograph, however, that may require permission. This is where the concept of copyright comes into the picture. In the U.S., we value the ability of artists and other creative people to make money from their own work. Therefore, artworks that were created since 1976 are automatically copyrighted by the original artist as soon as they are completed, and only the artist can determine who else can make money from their work. Its placement in public doesn't matter. This means that although someone can normally take a photo of the artwork, the artist must give permission for them to receive income from that photo—also called a “commercial use”.

Certain uses of that image are permissible. “Personal use”, or having the photo available so someone can refer to it doesn't require permission from the artist. Journalists can use the photo as part of their reporting, particularly if they are writing an article about the artwork. Teachers can show it in class. These are all examples of “fair use”. Such uses have been determined to be in the public interest, and outweigh the private interests the artist as its creator may have. It would also be very difficult to prove that these uses negatively affect the ability to receive income from the art work, which is what copyright law is intended to protect.

“Incidental use”, where the artwork is virtually unrecognizable in the image or is not the main purpose of the image in which it is included, is also unlikely to cause any harm if someone else makes money from it. Likewise, if the artwork is included in a general streetscape view and is a very minor element of the image, it would be difficult to show that any income realized from the image is due to the appearance of the artwork in it.

Additionally, “transformative” uses are more likely to be considered fair. Transformative uses are those that add something new, with a further purpose or different character, and do not substitute for the original use of the work. For example, photos of three dimensional works, such as sculptures, could be considered transformative because they require the photographer’s consideration of shadow, angle, lighting, and depth of field.

### **Fair Use of the Iconic “Putter Boy” Image**



To bring this discussion into tack sharp focus let’s examine a hypothetical example of potential fair use of my above “Putter Boy” photograph. Say I entered that photo in our June contest of images taken within 25 miles of Sandhills Community College. Would such conduct fall under the “fair use” exception?

I am confident that any competent judge would so rule. My use of the image is non-commercial and arguably transformative. The purpose of our competitions is education; we learn from shooting the image and having the image evaluated by a professional photographer:

The objective of the Sandhills Photography Club Competitions is to promote creative activity, and participation. It should broaden a member's field of interest and aid in perfecting their photographic skills.

### Section 1.3 of Competition Manual

Winning or losing, I would not make one dollar by entering my photo in the contest. Moreover, there is no negative financial impact on the Pinehurst Resort (or the deceased sculpture artist, Lucy Richards) by my entering the image in our contest. Consequently, my entry fits the "fair use" exception.

On the other hand say my image took first place in the competition (Tier 3 I dream) and then I did the following:

1. Printed the image 13" x 19", had it framed and entered it in the upcoming Artists League Exhibit with a sales price of \$500;
2. Put it on the internet for sale as a "stock" image at a price of \$25;
3. Created a series of greeting cards with the image prominently displayed with a sales price of \$10 per card.

Is my conduct now protected by the "fair use" exception to copyright infringement?

I would not make that argument in any tribunal. The bottom line is that any use that will result in income to someone other than the artist is considered a commercial use and may require written permission. Using a copyrighted image for commercial purposes without permission is likely infringement, and the artist can sue the infringer.

In conclusion simply entering an image containing artwork in a non-profit organization's educational photo competitions by contrast I believe is "fair use."